STATE OF MICHIGAN

COURT OF APPEALS

THE CINCINNATI INSURANCE COMPANY, Plaintiff-Appellee,	UNPUBLISHED November 10, 2005
v	No. 254333 Ottawa Circuit Court
JOSEPH J. BOTT, Defendant-Appellant.	LC No. 03-048040-CK

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

NEFF, J. *(dissenting).*

I respectfully dissent. Under the circumstances of this case, I would find that plaintiff's conduct is a basis for a claim of waiver or estoppel with respect to the denial of uninsured motorist coverage.

A theory of waiver in this case is essentially the same as that of estoppel. *Lothian v Detroit*, 414 Mich 160, 176; 324 NW2d 9 (1982); *Naparstek v Citizens Mut Ins Co*, 19 Mich App 53; 172 NW2d 205 (1969). "Generally, to justify the application of estoppel, one must establish that there has been a false representation or concealment of material fact, coupled with an expectation that the other party will rely upon this conduct, and knowledge of the actual facts on the part of the representing or concealing party. *Lothian*, *supra* at 177, citing 28 Am Jur 2d, Estoppel and Waiver, § 35, p 640. Conduct other than a promise that induces action of a definite and substantial character may provide a basis for a claim of equitable estoppel. *Mt Carmel Mercy Hosp v Allstate Ins Co*, 194 Mich App 580, 589; 487 NW2d 849 (1992).

There is a question of fact whether plaintiff's conduct induced the settlement under the presumption that it was in accordance with the policy provisions and in keeping with defendant's entitlement to no-fault coverage from plaintiff. The evidence indicated that plaintiff's claims adjuster remained silent in response to contact from defendant's counsel addressing the impending settlement with the third party and announcing an intent to settle for the policy limits. Plaintiff now seeks to deny uninsured motorist benefits on the ground that defendant failed to obtain plaintiff's consent to settle. These facts could support a finding that plaintiff's adjuster concealed a material fact and effectively prevented defendant from learning of the uninsured and underinsured policy provisions by lulling counsel into thinking that appropriate benefits were being obtained under the policy. *Id.* at 588, 590; see also *Brecht v Auto-Owners Ins Co*, unpublished memorandum opinion of the Court of Appeals, issued February 23, 1999 (Docket

No. 203956,), slip op p 2 (adjuster informed the plaintiff's counsel of the prerequisites for qualifying for underinsured motorist coverage, and the plaintiff's counsel indicated intent to comply with those requirements).

Estoppel is an equitable doctrine used to prevent results contrary to good conscience and fair dealing. *Lothian*, *supra* at 177. Equity in this case favors coverage. Unlike cases in which the no-fault claimant is a policyholder who failed to read policy provisions, here the claimant is simply an employee who was injured in a work-related accident for which he was not at fault. An employee typically has no access to an employer's policies of insurance. By all indications, the employee merely sought no-fault benefits on a fair and equitable basis, and they should be granted accordingly.

As this Court has stated, "[a] plaintiff's settlement with a negligent motorist or other responsible party destroys the insurance company's subrogation rights under the policy and bars the plaintiff's action for uninsured motorist benefits *unless the insurer somehow waives the breach of the policy conditions*." *Lee v Auto-Owners Ins Co (On Second Remand)*, 218 Mich App 672, 675; 554 NW2d 610 (1996) (emphasis added), citing *Adams v Prudential Prop & Cas Ins Co*, 177 Mich App 543, 544-545; 442 NW2d 641 (1989). Such waiver is justifiable where an injured party seeks legitimate benefits and the no fault insurer "lies in wait" until intended coverage is denied on a default exclusion.

The result in this case is inconsonant with the entire premise of Michigan's no-fault insurance scheme. "The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v Kelley*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). In this case, a straightforward, legitimate insurance claim for which the insurance policy undeniably provides benefits is denied because the process for invoking coverage ran afoul of a misapplied benefits exclusion. Plaintiff does not claim that the settlement in any way alters the benefits that are legitimately owed by plaintiff under the policy, i.e., that the settlement is detrimental to plaintiff's legal or economic position. The policy exclusion clause is being applied in a way that achieves no recognizable purpose under the no-fault scheme. *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35, 42-44; 645 NW2d 59 (2002). Permitting insurers to opportunely avoid payment of legitimate benefits is a misuse of the no-fault law and should not be sanctioned by the courts.

/s/ Janet T. Neff